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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF WARD,

Respondent,

-against-

No. 3

CITY OF LONG BEACH,

Appellant.

20 Eagle Street
Albany, New York 12207
January 02, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 3, Matter of
2 Ward v. City of Long Beach. Counsel, would you like
3 any rebuttal time?

4 MR. AGOSTISI: Yes, Your Honor, please, two
5 minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes, go
7 ahead.

8 MR. AGOSTISI: May it please the court,
9 Robert Agostisi for the appellant, City of Long
10 Beach.

11 CHIEF JUDGE LIPPMAN: Counselor, what was
12 the process that the - - - that Long Beach went
13 through here to make the determination that you did?

14 MR. AGOSTISI: The process was the
15 corporation counsel was designated by the city
16 manager at the time to render determination on this
17 hearing.

18 CHIEF JUDGE LIPPMAN: Yeah, but what did he
19 do? How did he make that determination? Was there a
20 basis for the determination?

21 MR. AGOSTISI: Absolutely, there were
22 multiple bases.

23 CHIEF JUDGE LIPPMAN: What was it? Yeah.

24 MR. AGOSTISI: Well, first there was the
25 fact that six months before Mr. Ward came in and

1 submitted his 207-a application, his wife, at the
2 time, had come to City Hall, unsolicited and
3 unscheduled meeting, and told city officials that her
4 husband did not hurt himself on a lubricated fire
5 pole as claimed in the firehouse, but rather at his
6 daughter's varsity soccer game.

7 CHIEF JUDGE LIPPMAN: And what did you do
8 to follow up on that?

9 MR. AGOSTISI: Immediately, right after
10 that meeting, Your Honor, Mrs. Ward was sent to the
11 Long Beach Police Department where she corroborated
12 the statements where it's a crime to make, or file -
13 - -

14 CHIEF JUDGE LIPPMAN: And what did they do
15 to follow up on that?

16 MR. AGOSTISI: Well, they quickly
17 determined that they had a conflict of interest,
18 because the police and fire stations are right next
19 to each other in City Hall, and they also determined
20 that the DA was better suited to undertake that type
21 of investigation, given that it was fraud. And they
22 had better resources for that.

23 CHIEF JUDGE LIPPMAN: And what happened
24 then?

25 MR. AGOSTISI: That's where we don't know,

1 Your Honor, because it - - -

2 CHIEF JUDGE LIPPMAN: So, I guess my point
3 to you is - - - what I'm trying to get at is, did you
4 have any process, any kind of hearing, letting him be
5 heard, that led you to the conclusion that you made,
6 other than what the wife who - - - apparently,
7 there's some kind of matrimonial proceeding going on
8 at the time - - - other than what she said, was there
9 anything in terms of Long Beach's due diligence that
10 led you to the conclusion that you did?

11 MR. AGOSTISI: There were several other
12 factors, Your Honor.

13 CHIEF JUDGE LIPPMAN: What were they?

14 MR. AGOSTISI: There were the fact - - -
15 there was the fact that the person designated to hear
16 the application was out playing beach volleyball with
17 the applicant a couple of days before.

18 CHIEF JUDGE LIPPMAN: Who, who - - - and
19 what conclusion do you draw from that?

20 MR. AGOSTISI: That the applicant was not
21 sufficiently disabled for purposes of - - -

22 JUDGE SMITH: But that doesn't corroborate
23 the wife's - - - you know, this is one of those, the
24 pot was never broken; anyway, I broke it somewhere
25 else. I mean, you - - - he - - - if he was playing

1 beach volleyball, then both he and his wife were not
2 telling the truth.

3 MR. AGOSTISI: That may have been the case.
4 However, we had reason to believe that the wife was
5 credible.

6 JUDGE PIGOTT: Well, then why'd the fire
7 commissioner fire him? The fire commissioner is the
8 one that denied him his benefits on July 10th. But
9 everything in this case talks about this meeting that
10 was later on. He was told he could appeal to the
11 city manager, but then the city manager sits down
12 with the corporation counsel and somebody else, and
13 they go through this evidentiary discussion over
14 admissions against interest, and then you've got a
15 fire - - - a police chief who says this is so secret,
16 I couldn't even take notes. And - - - I mean, it's a
17 disability claim, for goodness sake.

18 And as near as I can tell, the city manager
19 called it "his denial" - - - that was in August. The
20 fire commissioner made a decision that said - - - on
21 July 10th - - - to deny and said you can appeal to
22 the city manager. The city manager, on August, calls
23 it "his denial" and refers him to the corporation
24 counsel. The corporation counsel then says, I've
25 been designated by the city manager to review the

1 determination of the fire commissioner. And then
2 later on, he says that it was his decision to deny
3 it. I mean, this is like picking up mercury. You
4 don't know - - - I mean, whose decision was it?

5 MR. AGOSTISI: Ultimately it was the
6 corporation counsel's decision on appeal.

7 JUDGE PIGOTT: Okay, so when the fire
8 commissioner told him his benefits were denied, he
9 was not telling the truth.

10 MR. AGOSTISI: Well, no, his benefits were
11 denied, and then Mr. Ward was permitted an appeal, at
12 which point, the corporation counsel conducted - - -

13 JUDGE PIGOTT: Whose decision is he
14 appealing?

15 MR. AGOSTISI: The fire commissioner's.

16 JUDGE PIGOTT: So it was the fire
17 commissioner that made the determination?

18 MR. AGOSTISI: The initial determination,
19 yes.

20 JUDGE PIGOTT: All right. And the appeal
21 goes to the city manager.

22 MR. AGOSTISI: It went to the city manager;
23 that's correct.

24 JUDGE PIGOTT: Okay, and the city manager
25 then did what?

1 MR. AGOSTISI: He designated the
2 corporation counsel - - -

3 JUDGE PIGOTT: Well, did he review the
4 denial by the fire commissioner to see if it was
5 fair, or if it was an abuse of discretion or
6 arbitrary and capricious?

7 MR. AGOSTISI: To be candid, it was so long
8 ago, I can't recall the answer to that question, Your
9 Honor.

10 JUDGE PIGOTT: Isn't that kind of important
11 to this case?

12 MR. AGOSTISI: Well, no, because ultimately
13 it's the corporation counsel who rendered the - - -

14 CHIEF JUDGE LIPPMAN: Counsel, was there
15 any medical examination - - - the corporation counsel
16 - - - who saw him playing volleyball?

17 MR. AGOSTISI: The corporation counsel.

18 CHIEF JUDGE LIPPMAN: And is that a medical
19 determination by the corporation counsel, if he's
20 playing volleyball that that means that he is no
21 longer disabled? I mean, does that make any sense?

22 MR. AGOSTISI: Well, sure, in the sense
23 that a picture paints a thousand words, it makes a
24 lot of sense, Your Honor.

25 CHIEF JUDGE LIPPMAN: But doesn't there

1 have to be some process, some attempt to find out his
2 medical condition rather than the judge being the
3 prosecutor, the judge, the jury all at one time, say
4 "I saw him playing volleyball. No, it's turned
5 down." Isn't that a little arbitrary in terms of the
6 way that Long Beach proceeded in this?

7 MR. AGOSTISI: We don't think so, Your
8 Honor, because the corporation counsel based his
9 determination on a number of different factors.

10 JUDGE PIGOTT: Let me ask you this then.
11 If the police have a conflict of interest because
12 they live next door to the fire department, would the
13 corporation counsel have a conflict of interest if he
14 was a fact witness in the determination that's
15 ultimately going to be made?

16 MR. AGOSTISI: I don't think so, Your Honor
17 - - -

18 JUDGE PIGOTT: Why?

19 MR. AGOSTISI: - - - because he was the
20 ultimate - - - he was the person who made the
21 observation himself, and he was the fact finder.

22 JUDGE GRAFFEO: If he - - -

23 JUDGE READ: Did Ward submit any medical
24 evidence, by the way?

25 MR. AGOSTISI: I'm sorry, Your Honor?

1 JUDGE READ: Did Ward submit any medical
2 evidence?

3 MR. AGOSTISI: In his state disability
4 application, yes, which was reviewed by the
5 corporation counsel before he rendered a
6 determination.

7 JUDGE GRAFFEO: If the fire fighter's wife
8 had never appeared, either with the - - - either with
9 the fire department or the counsel's office or the
10 police department, wherever the heck she went, do you
11 think this case would have come out the same way?

12 MR. AGOSTISI: It's a very close question,
13 Your Honor, but the - - - one of the things that - -
14 -

15 JUDGE GRAFFEO: Because there's such a
16 strong possibility of revenge in this case,
17 considering that they apparently had quite a
18 contested divorce.

19 MR. AGOSTISI: Even if that was Beverly
20 Ward's motive, it doesn't mean she was being
21 dishonest with the City when she came forward
22 unsolicited.

23 JUDGE PIGOTT: Well, you could have put her
24 under oath, though, and had a detached - - -

25 JUDGE GRAFFEO: Well, does Section - - -

1 MR. AGOSTISI: That's why we sent her to
2 the police, Your Honor.

3 JUDGE GRAFFEO: If I could just finish.
4 Does Section 207-a(2) require that you conduct
5 hearings?

6 MR. AGOSTISI: No, it does not. We are not
7 required to conduct a hearing under the Section 207-
8 a(2).

9 JUDGE SMITH: Did you - - - is there any
10 procedural - - -

11 JUDGE GRAFFEO: So what do you use as a
12 basis for making the determination as to whether
13 there's a disability or not if you don't require
14 medical exams?

15 MR. AGOSTISI: Well, in this case, the
16 corporation counsel reviewed the state disability
17 retirement record. In addition, he - - - he was
18 sitting in the meeting with Mrs. Ward when that
19 happened.

20 CHIEF JUDGE LIPPMAN: Doesn't he have to
21 have a basis, still, to make the decision beyond the
22 fact that he thinks he's not disabled, or he thinks
23 he was lying? Doesn't there have to be some process
24 here even if it's not a hearing?

25 MR. AGOSTISI: Well, he made a credibility

1 determination. And under - - -

2 JUDGE SMITH: But wouldn't - - - wouldn't -
3 - - wouldn't common sense in that situation - - -
4 when the woman comes in and says her husband's a
5 crook, maybe he is, you say. Somebody says - - -
6 somebody says this happened at your daughter's soccer
7 game, how about it? Wouldn't that be - - - isn't he
8 entitled to that minimum of fairness?

9 MR. AGOSTISI: In terms of - - - and he was
10 given that minimum of fairness, Your Honor, because
11 at the end of the day, Mr. Ward's position was known
12 to the City through the state determination. And we
13 were - - -

14 JUDGE SMITH: Well, I mean, as I understand
15 it, Ward didn't know - - - if you assume that he's
16 telling the truth. Assume that he really was injured
17 on the fire pole, and his wife made it up about the
18 soccer game. Ward just gets a denial, saying we're
19 denying your pension; we can't tell you why. And he
20 has no idea what's going on.

21 MR. AGOSTISI: And the municipality is not
22 required to share that reasoning; it's just required
23 to make a rational determination under Article 78
24 standards.

25 JUDGE SMITH: Doesn't that seem a little

1 unfair even in a - - - even where he's not entitled
2 to due process, doesn't it seem right to at least
3 hear his side of the story?

4 MR. AGOSTISI: Well, we were - - - that's
5 the thing, Your Honor. We were aware of his side of
6 the story through the state disability application.

7 JUDGE SMITH: Well, but you weren't aware
8 of what - - - how he was - - -

9 JUDGE GRAFFEO: But how does he - - - how
10 does he know what issues - - - how does he know what
11 issues to address on the appeal to the fire
12 commissioner?

13 MR. AGOSTISI: How does Mr. Ward know what
14 issues to address?

15 JUDGE GRAFFEO: Yes.

16 MR. AGOSTISI: It's very simple. We were
17 aware of the fact that Mrs. Ward, in this case, Your
18 Honor - - - we were aware that she was going through
19 a divorce with her husband, and - - -

20 CHIEF JUDGE LIPPMAN: And you chose to
21 believe her, and that's the end of the story.

22 JUDGE GRAFFEO: But did he know what she
23 had said to the municipal officials?

24 MR. AGOSTISI: He later found out, and he -
25 - - he actually acknowledged in his papers that he

1 believed it was consistent with her - - - I guess - -
2 - her account.

3 JUDGE READ: He didn't dispute he was in -
4 - - he didn't dispute that he injured his knee,
5 right, at the - - - he didn't dispute the prior - - -
6 what was it - - - a beach volleyball game or that - -
7 -

8 CHIEF JUDGE LIPPMAN: Soccer game.

9 JUDGE READ: - - - that there was a
10 problem. He didn't dispute that.

11 MR. AGOSTISI: Oh, no, he was in a league
12 with the corporation counsel.

13 JUDGE READ: Well, let me ask you this,
14 just because I'm curious. Do poles in fire stations,
15 are they commonly lubricated?

16 MR. AGOSTISI: To the best of my knowledge,
17 not only are they not commonly lubricated, but
18 they're very seldomly ever used, at least in Long
19 Beach, anyway. They - - - firefighters tend to take
20 the stairs there, and we know that from all the other
21 207-a applications we get from - - -

22 JUDGE PIGOTT: Well, he had a witness,
23 right, another fire fighter that saw this happen.
24 And what was going through my mind, not being a
25 witness, is there's an awful lot of high jinks that

1 goes around in fire departments. And you know, if
2 somebody wanted to be funny, and decided to grease
3 the pole, something like this could happen. I mean,
4 there's - - - apparently the comptroller was
5 satisfied, so you've come up with a different
6 decision than the comptroller, and you don't think
7 you have to pay the benefits.

8 MR. AGOSTISI: Well, we think that the
9 corporation counsel, in his almost two decades of
10 service in Long Beach, was in a far better position
11 than - - - with all due respect to - - -

12 JUDGE PIGOTT: But you see, you work for
13 him or her. Maybe he's got an ax to grind with this
14 firefighter or with the fire department. Maybe they
15 had budget problems. But, I mean, no one has been
16 able to take a look at this other than this group
17 that got together and decided that admissions or - -
18 -

19 MR. AGOSTISI: Well, Your Honor, again, no
20 one asked Beverly Ward to come forward six months
21 before Mr. Ward submitted his disability application
22 to the City. She came forward to - - -

23 JUDGE PIGOTT: Do we know that? Maybe
24 you're making it up. Maybe the City's making all
25 this up. No one's under oath. Everything is just,

1 you know, well, I was playing volleyball, and she
2 came in, and therefore this guy who the comptroller
3 says is disabled - - - and gave him, by the way, a
4 twenty percent, so that you could have put him back
5 to work and you didn't - - - maybe he's the one
6 that's lying and we're all telling the truth.

7 MR. AGOSTISI: Well, Your Honor, her
8 actions are undisputed in this action,

9 JUDGE PIGOTT: No one has - - -

10 MR. AGOSTISI: I'm sorry?

11 JUDGE PIGOTT: No one has cross-examined
12 her.

13 MR. AGOSTISI: No one has cross-examined
14 her, except she did retell her story, chapter and
15 verse, to the police department.

16 CHIEF JUDGE LIPPMAN: Okay, counsel,
17 thanks.

18 MR. AGOSTISI: Thank you.

19 CHIEF JUDGE LIPPMAN: You'll have rebuttal.
20 Counsel?

21 JUDGE GRAFFEO: Counsel, the statute
22 doesn't require a hearing, so what's the process that
23 you feel should've been followed here?

24 MR. STOBBER: Even without a hearing, you
25 are entitled to a due-process opportunity to confront

1 evidence that's being used against you. And Your
2 Honor, you were absolutely right. The one individual
3 who denied the claim was the fire commissioner. And
4 one thing that the record makes clear is we don't
5 know what the fire commissioner based his denial on.
6 And I agree. And I had one of these moments of
7 clarity last night.

8 JUDGE GRAFFEO: So, is your position there
9 should have been a written decision from the fire
10 commissioner? Is that what you're asking?

11 MR. STOBBER: He did do a written decision
12 that says, "Your benefits are denied. You may appeal
13 to the city manager", which Mr. Ward did. Mr. Ward
14 then received a letter from the city manager saying,
15 "I've delegated to the corporation counsel to conduct
16 proceedings." My understanding when an individual is
17 receiving a document that says "to conduct
18 proceedings", at the very least, I'm going to have
19 the opportunity to come in for a meeting, present
20 whatever it is that you want to hear as to why I
21 think I'm entitled to - - -

22 JUDGE SMITH: But what says here - - - I
23 mean, I see the common sense of it, but is there some
24 law that says you're entitled to anything - - - any
25 kind of procedure?

1 MR. STOBBER: I would say, looking at the
2 200-plus years of common law that says a decision is
3 rational - - -

4 JUDGE SMITH: Well, could you narrow it
5 down a little?

6 MR. STOBBER: Right, rational basis. If you
7 look at, for example, the Catabiano case, in which
8 the court, Third Department, held that "the burden of
9 going forward is satisfied by introducing evidence in
10 admissible form, which it believed would prove that
11 the issue" - - -

12 JUDGE SMITH: Are you really saying that
13 they had to have evidence in admissible form to
14 terminate this guy's benefits?

15 MR. STOBBER: At the Article 78 stage was we
16 brought an action. If you recall, they didn't give
17 Mr. Ward anything. They didn't tell him that his
18 wife had come in - - -

19 CHIEF JUDGE LIPPMAN: What's your argument,
20 in a nutshell, that what they did was arbitrary and
21 irrational?

22 MR. STOBBER: It was arbitrary; it was
23 capricious. We don't even know what Mrs. Ward
24 actually said, because there's no statement from her.
25 She did not file with the police department - - -

1 CHIEF JUDGE LIPPMAN: It was arbitrary
2 because it was what, unsubstantiated?

3 MR. STOBER: It's unsubstantiated; it's
4 unverified.

5 CHIEF JUDGE LIPPMAN: What about the fact
6 that the - - - your adversary says that the attorney
7 saw him playing volleyball?

8 MR. STOBER: I give you the NFL game day
9 argument. You see individuals in the NFL who suffer
10 horrific injuries, go through years and years of
11 rehab. You may see them engaging in all types of
12 activities, but are they game-day ready?

13 JUDGE GRAFFEO: Did you client put any
14 updated medicals to indicate what his medical
15 condition was - - -

16 MR. STOBER: The law doesn't require it.

17 JUDGE GRAFFEO: - - - closer to this - - -

18 MR. STOBER: The law doesn't require it,
19 and they never - - - the City, frankly, never asked
20 him for it.

21 JUDGE GRAFFEO: Could they have asked him
22 to undergo another IME closer in time to the appeal?

23 MR. STOBER: I think if he's putting
24 himself on the line to ask for 207-a(2) benefits,
25 then as part of that, just as in the Flynn case,

1 where there were two physicians who examined Mr.
2 Flynn to determine whether he was entitled to the
3 207-a(2) benefits, then, yes, the City could have
4 said, you know what? You're asking for these
5 supplemental benefits - - -

6 JUDGE GRAFFEO: I'm just asking because
7 we're not just dealing with this case. Whatever we
8 say here, we're kind of setting - - -

9 MR. STOBBER: Setting precedent for the
10 whole state.

11 JUDGE GRAFFEO: - - - a precedent for other
12 municipalities that go through this process and the
13 statute's not very particular.

14 MR. STOBBER: And as determined - - -

15 CHIEF JUDGE LIPPMAN: So, what is required
16 in your mind, as a follow-up to Judge Graffeo's
17 question, what are they required to do as might be
18 applied to another case?

19 MR. STOBBER: As it applies across the
20 board, what I think a municipality faced with an
21 application for a 207-a(2) benefit, an individual's
22 or a - - -

23 CHIEF JUDGE LIPPMAN: What's the rule?
24 What do they have to do?

25 MR. STOBBER: They have to, A, analyze the

1 application that the individual provides; B, if
2 there's any question in their mind as to the
3 particulars of whether this individual is either
4 injured - - - you know, there's the causation and
5 there's the - - - has he healed - - - if there's a
6 question involved, I think that they are entitled to
7 have him examined. It's - - -

8 JUDGE PIGOTT: So it's not a - - - it's not
9 - - - you're not asking for - - - they should have
10 done a formal hearing, but they at least should have
11 called you up and said, you know, your wife - - -
12 your client - - - you know, your former wife's in
13 here say - - - telling a story; you better explain,
14 or something like that. And then, in an Article 78,
15 then we'll decide whether it's arbitrary and
16 capricious. But the relief here - - - are you asking
17 for a hearing?

18 MR. STOBBER: No, I'm asking for the
19 benefits.

20 JUDGE PIGOTT: Now, why would you be
21 entitled to the benefits if their decision was
22 arbitrary and capricious? I mean, all that means is
23 they didn't make a good decision.

24 MR. STOBBER: They - - -

25 JUDGE PIGOTT: Does that mean that you win?

1 MR. STOBBER: I think - - -

2 JUDGE PIGOTT: Or are you entitled to a
3 hearing to determine whether you should win?

4 MR. STOBBER: The law doesn't allow for a
5 hearing. I think I win.

6 JUDGE PIGOTT: That means - - - Article 78
7 does. You made that point yourself. In other words
8 the Judge could have ordered a hearing under Article
9 78.

10 MR. STOBBER: He could have ordered a
11 hearing, but I think I win. They - - -

12 JUDGE SMITH: Well, how - - - why should
13 you win, if there's doubt about whether your guy was
14 really injured or not?

15 MR. STOBBER: There's no doubt.

16 JUDGE SMITH: Why shouldn't there - - -

17 MR. STOBBER: Where is the doubt? The doubt
18 - - -

19 JUDGE SMITH: Well - - -

20 MR. STOBBER: Even if you took Beverly
21 Ward's statement - - -

22 JUDGE SMITH: - - - people have been known
23 to file fraudulent claims for benefits before. And
24 if - - - and when your wife says you did it, then
25 even if - - - even if she's mad and spiteful, it's

1 not ridiculous to suppose that she knows what she's
2 talking about.

3 MR. STOBBER: I think it is ridiculous to
4 suppose that somebody who, for two years prior to
5 this, has been in the middle of a divorce - - -
6 there's no statement. And look at the record
7 carefully, there's nothing - - -

8 JUDGE READ: But you don't think there's
9 anything suspicious about the accident?

10 MR. STOBBER: No. I was - - - I represented
11 him at the hearing. We had testimony from a fire
12 fighter who said that rather than the Brasso that's
13 used to polish these, that I believe they used WD-40,
14 or some other lubricant on there, and unfortunately,
15 when my guy then went on - - - it was a rookie who's
16 - - - one of the rookie jobs, apparently, in the fire
17 department is clean the brass pole, and - - -

18 JUDGE PIGOTT: With WD-40.

19 MR. STOBBER: Well, he used - - -

20 JUDGE PIGOTT: Wow.

21 MR. STOBBER: He used an - - -

22 JUDGE PIGOTT: I hope he's not anywhere
23 near the fire truck.

24 JUDGE SMITH: Isn't it a little strange to
25 slide down the fire pole when you're not going to a

1 fire, when you're going just to pick up a new engine?

2 MR. STOBBER: You know, the guys at the
3 firehouse use that pole for various reasons.

4 JUDGE SMITH: Okay, I guess, unless - - -

5 MR. STOBBER: The pole is three floors down,
6 and if somebody's - - - you know, if somebody's
7 taking a delivery - - - I don't know the particulars,
8 today, of when they do use it going up and whatever,
9 but - - -

10 JUDGE SMITH: Well, let me - - - let me ask
11 you a different - - - okay, I - - - let me ask you a
12 different question.

13 MR. STOBBER: It's there for use.

14 JUDGE SMITH: I withdraw that question; I'm
15 going to ask another one.

16 MR. STOBBER: Okay.

17 JUDGE SMITH: Isn't there - - - isn't there
18 a certain amount of abuse in benefit claims in this
19 state? Don't - - - don't we have to allow
20 municipalities to be vigilant and to be a little
21 cynical, sometimes, when they get these claims?

22 MR. STOBBER: I, as a union attorney, would
23 never profess that there's abuse. I would say that
24 there may be claims that are great; other claims that
25 are questionable. In this particular case - - -

1 JUDGE SMITH: Once a while, even, that are
2 fraudulent?

3 MR. STOBER: You know, I guess you can say
4 that once in a while they're fraudulent, and we would
5 hope that the system that we have in place ferrets
6 out those. This - - -

7 CHIEF JUDGE LIPPMAN: Counsel, what's in
8 the record which, if not contested, means that your
9 client gets the benefits?

10 MR. STOBER: I can't - - -

11 CHIEF JUDGE LIPPMAN: You know what I mean?
12 Let's assume you're right - - -

13 MR. STOBER: Okay.

14 CHIEF JUDGE LIPPMAN: - - - that
15 unsubstantiated, whatever the wife says, and the
16 looking at the - - - seeing him at the volleyball
17 game really doesn't amount to much. What's in the
18 record that says if it's not a challenge, you should
19 get the pension rather than there being an issue of
20 fact?

21 MR. STOBER: I have a finding from the New
22 York City Comptroller that he's permanently disabled
23 from performing his duties.

24 CHIEF JUDGE LIPPMAN: Okay, and what was
25 that based on? What did - - - how did that come

1 about?

2 MR. STOBER: That came about as a result of
3 a due process hearing. There was a full-blown
4 hearing, in which the state produced evidence and
5 doctors' testimonies and evidentiary testimony, and I
6 produced - - -

7 JUDGE SMITH: But it is the law - - -

8 JUDGE GRAFFEO: But that's the a(1) - - -
9 that's the a(1) benefits, correct?

10 MR. STOBER: Yes, the a(1), no, no, no - - -
11 -

12 JUDGE GRAFFEO: So, what in addition do you
13 need to show to get the supplemental a(2) benefits?

14 MR. STOBER: This was the 363 benefits.
15 When you get the accidental - - -

16 JUDGE GRAFFEO: Okay.

17 MR. STOBER: - - - disability retirement.

18 JUDGE GRAFFEO: So - - -

19 MR. STOBER: So once that was found - - -
20 and the case law says that while the - - -

21 JUDGE GRAFFEO: Then what in addition do
22 you need to show to get the supplemental? I think
23 that's what the Chief's asking you.

24 MR. STOBER: I, frankly, don't think you
25 have to show anything else.

1 JUDGE SMITH: But you do admit that he's
2 not bound by the - - - that the City was not bound by
3 the comptroller's determination?

4 MR. STOBBER: That is correct. Case law
5 says they're not bound, but they have to consider it.
6 And any - - -

7 JUDGE SMITH: But they had evidence the
8 comptroller didn't have.

9 MR. STOBBER: Did they?

10 JUDGE SMITH: Yeah, they had - - - you
11 don't think - - - you don't think his wife's saying
12 he's lying is any evidence at all?

13 MR. STOBBER: Do we know that his wife
14 actually said that? Is there an affidavit from here?
15 Is there a written statement? Is there anything?
16 And if you look at what was produced on the record,
17 they're very careful in what they parse their words
18 on. They don't even say that she observed it. She
19 just learned that he had been injured in a soccer
20 game. How do we know?

21 JUDGE SMITH: Well, maybe he admitted it to
22 her.

23 MR. STOBBER: That he admitted what?

24 JUDGE SMITH: That he was faking his
25 injury. People have been known to tell their wives

1 such things.

2 MR. STOBBER: I disagree completely that
3 that was said here. And, you know, on one other
4 issue which they tried to say was this was against
5 her financial interest. If you recall, at the time
6 that she came to the corporation counsel, he had not
7 made this application for the 207-a(2) benefits. All
8 he had was his dis - - - accidental disability
9 benefits - - -

10 JUDGE SMITH: It is true, as a general
11 rule, isn't it - - - I mean, this may not be an
12 overpowering point - - - but it is true, that most
13 people in divorces would rather their spouse be rich
14 than poor.

15 MR. STOBBER: I don't agree with that
16 completely, because where you have a situation here,
17 where this woman would not be entitled to the
18 accidental disability portion of his retirement - - -
19 we're not even talking about the 207-a aspect - - -
20 just the disability retirement that he was receiving.
21 She's not entitled to that. She's bitter; she's
22 upset that he's getting this money and I don't get
23 any portion of that? She marches herself down to the
24 corporation counsel or to the city manager's office,
25 and says, you know what? This guy's lying. He

1 talking about.

2 MR. STOBBER: Right, right. 363 - - - once
3 you get to 363, you've got your 363. They're not - -
4 -

5 JUDGE PIGOTT: Forever. But the - - -

6 MR. STOBBER: Yeah, you're not going to - -
7 -

8 JUDGE PIGOTT: - - - 207-a can be denied.

9 MR. STOBBER: The 207-a. And he was off of
10 207-a(1) when he got the 363. And then what happened
11 was under 207-a(2), that's where under an accidental
12 disability pension, you can ask for that extra
13 quarter.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.
15 Thanks - - -

16 MR. STOBBER: Okay, thank you, Your Honors.

17 CHIEF JUDGE LIPPMAN: Thanks, counsel.
18 Counselor, rebuttal?

19 MR. AGOSTISI: Yes, Your Honor. Just very
20 briefly, this court's decision in Ridge Road Fire
21 District v. Schiano is very instructive in this case,
22 because in that case, the majority held that if
23 substantial evidence supports more than one position,
24 it's actually arbitrary - - -

25 JUDGE READ: Well, is this a substant - - -

1 is this a substantial evidence case, though?

2 MR. AGOSTISI: Yeah, Article 78s, that is
3 the standard in - - -

4 JUDGE READ: There was no hearing.

5 MR. AGOSTISI: There was no hearing,
6 however, but generally speaking, substantial evidence
7 is just something that could be used to support a
8 reasonable - - -

9 JUDGE SMITH: Isn't rational basis really
10 whether the - - - when there's no hearing, isn't
11 rational basis rather than substantial evidence what
12 we usually say?

13 MR. AGOSTISI: Yes, that's actually
14 accurate, Your Honor, rational basis. And that's
15 exactly what the City of Long Beach had when it
16 evaluated all these - - -

17 CHIEF JUDGE LIPPMAN: Based on what, again,
18 counsel?

19 MR. AGOSTISI: Based on Beverly Ward's
20 statements, based on the suspect nature of the
21 injury, and based on the volleyball. And one of the
22 things that we've always believed was reversible
23 error in this case was the fact that the court made
24 really no effort to evaluate these things - - -

25 CHIEF JUDGE LIPPMAN: Counsel, if we

1 disagree with you on that, do you believe he gets the
2 pension? Let's say we don't find that this is
3 substantial - - - that there is - - -

4 JUDGE READ: That there's a rational basis.

5 CHIEF JUDGE LIPPMAN: - - - there's a
6 rational basis, does he get the pension?

7 MR. AGOSTISI: Well, the lower court simply
8 annulled the City's determination, so I assume it
9 just comes right back to the City.

10 JUDGE READ: So the answer's no.

11 MR. AGOSTISI: Correct.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. AGOSTISI: Thank you.

14 CHIEF JUDGE LIPPMAN: Thanks. Thank you
15 both.

16 MR. STOBBER: Thank you, Your Honor.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF WARD v. CITY OF LONG BEACH, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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